STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

IN THE MATTER OF THE JOINT PETITION OF UNITED TELEPHONE OF NEW JERSEY, INC. D/B/A SPRINT AND LTD HOLDING COMPANY FOR APPROVAL PURSUANT TO N.J.S.A. 48:2-51.1 AND N.J.S.A. 48:3-10 OF A CHANGE IN OWNERSHIP AND CONTROL	)))))	PROVISIONAL ORDER ON MOTION FOR RECONSIDERATION AND MOTION FOR STAY DOCKET NO. TM05080739

SERVICE LIST ATTACHED

BY COMMISSIONER CONNIE O. HUGHES

This matter has been opened to the Board of Public Utilities ("Board") by the filing of a motion by the Division of the Ratepayer Advocate ("Ratepayer Advocate") for reconsideration as to the prehearing Order issued by the Board on October 27, 2005. The Ratepayer Advocate sets forth a number of complaints in reference to this matter, and seeks a number of modifications to the schedule and associated Prehearing Order, as it applies to the proposed spin-off of United Telephone of New Jersey ("United-NJ").

The motion, filed on November 14, 2005, set forth a number of factual claims followed by five foundations for the reconsideration. The Ratepayer Advocate claims that despite the filing of this Petition in August, the Ratepayer Advocate did not receive the confidential testimony until October 4, 2005, and that a tentative schedule was agreed upon, based upon full and complete discovery. The Ratepayer Advocate claims that, at the prehearing conference, Petitioners instead presented a schedule other than that agreed upon by the Ratepayer Advocate, to which the Ratepayer Advocate objected. Furthermore, the Ratepayer Advocate claims it submitted both comments and reply comments as to the scope of the hearing, but Petitioners only filed reply comments, and thus the Ratepayer Advocate was required to file supplemental comments, responding to the issues it claims were first raised in the Petitioners' reply. The Prehearing Order did not, according to the Ratepayer Advocate, reference these comments submitted by the Ratepayer Advocate. The Ratepayer Advocate also objects that the Prehearing Order failed to adopt the Ratepayer Advocate's request for a Phase II proceeding, did not clarify the standard of review, and set a schedule for testimony that included Ratepayer Advocate testimony to be due by no later than November 28, 2005.

In terms of the specific foundation for the reconsideration, the Ratepayer Advocate claims that the Board's Order failed to identify the legal standard to be applied to the Joint Petition despite the request by the Ratepayer Advocate to "reaffirm that the positive benefits standard would apply." The failure of the Board to address this issue, claims the Ratepayer Advocate, violates due process and fundamental fairness such that a delay is necessary to allow for the

identification of the standard. Additionally, the Ratepayer Advocate claims that the Joint Petition is incomplete and thus the schedule does not include sufficient time, and should include, at a minimum, the additional six weeks between when the Petition was filed and when the confidential information was provided to the Board Staff and the Ratepayer Advocate as well as additional time based upon the failure of the Petition to address additional issues the Ratepayer Advocate claims are germane to the Petition. The Ratepayer Advocate also objects to the failure of the Board's Order to address other issues raised by the Ratepayer Advocate beyond the statutory criteria set forth in N.J.S.A. 48:2-51.1, and claims that the Order fails to set forth a timeframe for the Joint Petitioners to file initial testimony in support of the payphone issue. Finally, the Ratepayer Advocate claims that Board Staff, in the Order, "misconstrued and misstated the Ratepayer Advocate's position with respect to the schedule," and that this action caused the inclusion of a requirement that the Ratepayer Advocate work over the Thanksgiving Holiday and the Christmas/New Year Holiday. Ratepayer Advocate initial motion, November 14, 2005, at 8-9. As such, the Ratepayer Advocate calls for reconsideration of the Order.

On November 17, 2005, United Telephone of New Jersey, Inc. d/b/a Sprint and LTD Holding Company (collectively, "Petitioners") filed a reply to the Ratepayer Advocate's motion, calling upon the Board to reject the Ratepayer Advocate's motion in its entirety. In support of this, Petitioners provided a brief history of the matter leading up to the issuance of the Prehearing Order by the Board, including a discussion of the actions taken by the Petitioners in August 2005 to notify the Board and the Ratepayer Advocate of the pending nature of the Petition, the signing of a confidentiality agreement between Staff and Petitioners on September 9, 2005, as well as the claim by the Petitioners that the Ratepayer Advocate refused to sign the same agreement until October 4, 2005, thus resulting in the month delay of the turn-over of documents to the Ratepayer Advocate (and not to the Staff as claimed by the Ratepayer Advocate) that the Ratepayer Advocate uses as one of the foundations for its motion, and a history of discussions as to the tentative schedule. Specifically, Petitioners claim that they met with the Ratepayer Advocate on September 30, 2005 and worked out a tentative schedule, at which time the Ratepayer Advocate did not object to the proposed scope of the proceeding, although the Ratepayer Advocate did note concerns about the holiday schedule. According to the Petitioners, the tentative schedule was modified to ensure that the bulk of work due over the holidays would fall upon the Petitioners. Subsequent modifications of the schedule, based upon the history provided by the Petitioners, still resulted in the Ratepayer Advocate having its holidays free. On October 11, 2005, Petitioners claim that, at the prehearing conference, the Ratepayer Advocate first raised issue with the scope of the proceeding and objected to the tentative schedule. Petitioners claim that the Ratepayer Advocate demanded that the additional week included in the schedule based upon the Board's requirements should be included at the beginning of the process rather than at the end. According to the recitation provided by the Petitioners, both Petitioners and Staff noted to the Ratepayer Advocate that this modification would require holiday work on the part of the Ratepayer Advocate. Petitioners' claim that the Ratepayer Advocate nevertheless insisted on this modification, and thus the schedule included in the Prehearing Order issued. Furthermore, claims the Petitioners, the scope of the proceeding was addressed by all parties, and the Ratepayer Advocate was not precluded from the discussion or in any way limited from providing a response on this issue.

As to the legal merits of the motion for reconsideration, the Petitioners note that the Ratepayer Advocate fails to meet the minimum legal standards set forth at N.J.A.C. 14:1-8.6, in that the Ratepayer Advocate fails to raise or identify legal or factual errors or omissions and instead simply repeats other earlier and unsuccessful arguments. The Petitioners also assert that the failure of the Ratepayer Advocate to receive copies of confidential information was based upon the failure of the Ratepayer Advocate to sign the necessary confidentiality agreement, and thus

it should not serve as a foundation for the pending motion. Furthermore, the Petitioners take objection to the claim that the Board has adopted a new standard of review for all proceedings, and instead continues its practice of making fact-sensitive, case-by-case decisions. Petitioners also claim that the Ratepayer Advocate makes a new argument in this motion, claiming that the Joint Petition is deficient and thus the Prehearing Order must be modified. This claim, notes the Petitioners, is wrong for a number of reasons; first, the Petition is not incomplete – the rules governing practice before the Board do not require the submission of confidential testimony with the initial Petition and second, the Ratepayer Advocate had the opportunity to receive the confidential testimony prior to the Petition being filed but failed to sign the necessary confidentiality agreement until early October. The Petitioners also note that the Ratepayer Advocate claims that debt is being issued by a public utility such that the Board must approve the transaction under N.J.S.A. 48:3-9 and N.J.A.C. 14:1-5.9, and that such claim is wrong because the entity issuing the debt is not a regulated utility as required by the statute. The claim that the Ratepayer Advocate has had insufficient time to hire additional consultants, according to the Petitioners, is predicated upon the failure of the Ratepayer Advocate to act in a timely manner, and should not serve as a foundation for a modification of the schedule. Finally, Petitioners claim that, while they do not agree with the Board's decision to include the payphone issue, that issue is not part of the Petitioners' case in chief such that direct testimony is not necessary by the Petitioners, and thus any failure on the part of the Board to direct a deadline for its submission is meaningless and can not constitute a foundation for modification of the Prehearing Order. As such, the Petitioners call upon the Board to deny the motion for reconsideration in its entirety.

On November 18, 2005, the Ratepayer Advocate submitted a "factual clarification" as to the dates surrounding the confidentiality agreement. In this clarification, the Ratepayer Advocate claims that Board Staff executed the confidentiality agreement with references to the Ratepayer Advocate stricken from the document. The Ratepayer Advocate claims that it then executed the same document, although with the references to the Ratepayer Advocate included, and submitted that to the Petitioners, but that the Petitioners demanded that the Ratepayer Advocate sign a "Ratepayer Advocate Addendum" as well, and that this demand on the part of the Petitioners was the cause of the delay in the Ratepayer Advocate receiving the confidential information.

On November 21, 2005, the Communications Workers of America, AFL-CIO ("CWA") filed a request for an extension of the date upon which it must file its direct testimony based upon its failure to receive discovery following its recent intervention. According to CWA, its first discovery was issued on November 10, 2005 and to date no response has been received. Accordingly, CWA requests an extension on its direct testimony until two weeks following receipt of discovery.

On November 23, 2005, via email at 4:01 p.m., the Ratepayer Advocate filed for a stay of the schedule pending the Board's disposition of this reconsideration motion. In support of this motion, the Ratepayer Advocate notes that the reconsideration motion remains outstanding, that two motions to compel are pending,[1] and that the Fifth Set of discovery is not due until December 6, 2005. Thus, the Ratepayer Advocate claims it is unable to issue its initial testimony.

[1] The first motion to compel has been decided and copies of the Order were emailed to all parties on November 23, 2005, although it is possible that the Order and the Ratepayer Advocate's motion passed each other in transmission.

DISCUSSION

The Board is authorized to issue a stay under N.J.A.C. 1:1-18.6. A stay pending reconsideration is an extraordinary equitable remedy, and is used only in limited circumstances and with significant restraint, and only when the movant establishes: 1) a likelihood of success on the merits, 2) irreparable injury to the movant absent a stay, 3) no substantial harm to other parties, and 4) no harm to the public interest. Virginia Petroleum Jobbers Assoc. v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958); United States v. Key Oil Co., Inc., 460 F. Supp. 878, 878 (D.N.J. 1978), citing Pitcher v. Laird, 415 F.2d 743, 744-45 (5th Cir. 1969); Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). A stay is not a matter of right, even if irreparable harm may otherwise result. Yakus v. United States, 321 U.S. 414, 441, 64 S. Ct. 660, 675, 88 L. Ed. 834 (1944). Instead, it is an exercise of sound judicial discretion; the propriety of its issue is dependent upon the entire circumstances of a particular case, and "consideration of justice, equity and morality." Virginia Railway Co. v. United States, 272 U.S. 658, 672-73, 47 S. Ct. 222, 228, 71 L. Ed. 463, 471 (1926). Because a stay is the exception rather than the rule, GTE Corp. v. Williams, 731 F.2d 676, 678 (10th Cir. 1984), the party seeking such relief must clearly carry the burden of persuasion as to all of the prerequisites. United States v. Lambert, 695 F.2d 536, 539 (11th Cir. 1983). In deciding requests for relief such as this, the Board has applied the same standard used by the trial courts. See, e.g., I/M/O Jersey Central Power and Light Co., Docket No. EM92030359, at 2 (March 7, 1994).

Here, the Ratepayer Advocate has neither attempted nor would be able to make the necessary showing. The motion for reconsideration, as will be seen below, does not have a likelihood of success on its merits, and no irreparable injury is present. Furthermore, as a decision on the Prehearing Order is being issued in this Order, the application is moot. Finally, the Ratepayer Advocate offered no explanation as to why the request for a stay was not included with its initial motion for reconsideration, particularly given the timeframe necessary for replies and responses. Accordingly, the application for a stay is HEREBY DENIED.

While N.J.A.C. 1:1-12.2 would normally require that the Ratepayer Advocate be granted an opportunity to provide a response to Petitioners' reply, the filing of a stay application makes clear that the Ratepayer Advocate is seeking an expedited decision on this matter. In light of that need, and in light of the existing schedule, I will provide that expedited review.

The standards for reconsideration under N.J.A.C. 14:1-8.6 require the identification of alleged errors of fact or law. A motion for reconsideration should not be sought merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, the moving party should identify those elements that the finder of fact failed to consider or those legal requirements that the finder of fact failed to obey. Here, the issues raised by the Ratepayer Advocate are, at their core, predicated upon the Ratepayer Advocate's disagreement with the results, not over any facts or law that the Board failed to consider. An express "standard of review" is not one of the requirements of a Prehearing Order, and thus its alleged failure to be included is not fatal to the Prehearing Order. The Board's recent decision in I/M/O the Joint Peittion of Public Service Electric and Gas Company and Exelon Corporation, BPU Docket No. EM05020106, Order on Standard of Review (Nov. 9, 2005), provides for a case-by-case review pending rulemaking, and thus requires an opportunity for all parties to brief the issue. Until the proposed regulations are in place, a Prehearing Order is not necessarily the only proper venue for this issue. Likewise, the "failure" of the Board to agree with the Ratepayer Advocate as to the nature and scope of the proceeding or as to the alleged "incomplete" nature of the Petition is also not a foundation suitable for reconsideration. Finally, there appears to be no disagreement that the Ratepayer Advocate requested additional time that would result in

submissions being due near the Thanksgiving Holiday, and thus this voluntary acceptance, even in conjunction with the overall objections to the schedule, should not now serve as a foundation for relief.

Thus, the Ratepayer Advocate fails to raise a sufficient foundation that the Board's decision was based upon a failure to consider or appreciate significant evidence or law. The decision of the Board is not arbitrary, capricious or unreasonable. Instead, the Ratepayer Advocate raises issues that had been raised previously before the Board and upon which the Board made reasonable and rational determinations. In essence, the Ratepayer Advocate is unhappy with the determination made by the Board; this unhappiness, however, is not an appropriate basis for a motion for reconsideration. In the absence of a significant showing by the Ratepayer Advocate that the Board acted in an obviously incorrect or inappropriate manner, reconsideration should be denied.

As to the request by the CWA for an additional two weeks in which to provide its initial testimony, I find that an extension at this time is inappropriate, based upon the schedule and the need for a timely decision. Nevertheless, CWA should have the opportunity to supplement its testimony once it receives the requested discovery. As such, CWA shall be granted the opportunity to provide supplemental testimony one week after receipt of the discovery referenced in its letter.

Accordingly, based upon the above, I HEREBY FIND that the motion for reconsideration is without merit and ORDER that the motion for reconsideration is HEREBY DENIED. Furthermore, I HEREBY FIND that the motion for a stay is MOOT and therefore DENIED. The request by the CWA for an extension is HEREBY DENIED, although CWA is GRANTED an opportunity to provide, within one week from receipt of the discovery requests referenced in its letter of November 21, 2005, supplemental testimony.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: 11-28-05

BY:

CONNIE O. HUGHES
COMMISSIONER